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No. 484

OCT 28 1930
CHARLES ELMORE CRO
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Supreme Court of the United States

OCTOBER TERM, 1930

FEDERAL TRADE COMMISSION, PETITIONER,

v.

RALADAM COMPANY, RESPONDENT

On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Brief of Respondent in Opposition to Petition for Certiorari.

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Brief of Respondent in Opposition to Petition for Certiorari.

OPINION BELOW

The opinion of the lower court (R.541-550)—the United States Circuit Court of Appeals for the Sixth Circuit—is reported in 42 Fed. (2d) 430.

STATEMENT.

Respondent labeled its product, "recommended as a treatment for the reduction of excessive fat" (R.9),—as appears from the labels on the boxes which, with their contents, constitute Commissioner's Exhibits 2 and 3

(R.42-44).* Such "treatment" consisted of respondent's Marmola tablets; and of a booklet of instructions and advice as to the self-administration of such tablets, which was inserted inside, and supplied with, each retail package of respondent's tablets (R.43). The ingredients of which respondent's tablets were composed, are shown in the record (R.9, 471; Comm. Ex. 4, R. 48; and p. 20 of the booklets in Comm. Exs. 2 and 3, R. 43). The booklet which respondent was regularly supplying with each retail package of its tablets on November 16, 1929 (R. 408),—when respondent filed its answer (R.411-507) to petitioner's crossbill (R.401-407),—is also shown in the record (R.465-475); but such booklet is in some respects different in its contents (R.412-413)—although not markedly so—from the booklet contained in Comm. Exs. 1 and 2 (R.42-44), which respondent was regularly supplying to its patrons at the time of the proceeding before the petitioner.

Respondent advertised its anti-fat treatment widely, in magazines and newspapers (R.60-61). The character of the advertisements published by respondent, at the time of the proceeding before petitioner, is shown by Comm. Exs. 6, 7, and 8 (R.65); Comm. Ex. 9, containing 107 ad-

*At the time of the preparation of this brief, it is understood—from information obtained from the Clerk of this court—that the exhibits, although a part of the record in this case, have not yet been certified to, or lodged in, this court. The exhibits were first introduced in evidence at the hearings that were held by petitioner's trial examiner, in the initial proceeding before petitioner (Comm's Ex. 1, R.32-33; Exs. 2, 3, R.42-44; Ex. 4, R.48; Ex. 5, R.63; Exs. 6, 7, 8, R.65; Ex. 9, containing 107 advertisements, R. 108; Exs. 10, 11, 12, R.109-110; Resp's Ex. 1, R.90-91). By stipulation, none of the exhibits introduced in the proceeding before petitioner, was printed in the record of the petitioner's proceeding that was filed in the lower court; instead, such exhibits were themselves certified to, and physically lodged in, the lower court (R.1-2). It is understood, from a statement by the Clerk of the lower court, that on August 29, 1930,—after petitioner's time for applying for a rehearing had expired, and after the lower court's mandate had been sent down to petitioner,—the exhibits were sent by the Clerk of the lower court to petitioner; and that they were not in the lower court when the record herein was certified, on September 17, 1930 (R.550).

vertisements (R.108); and Comm. Exs. 10, 11, and 12 (R. 109-110). In the absence of those exhibits, a notion of the general character of some of the advertisements that were being published by respondent at the time of the proceeding before petitioner, may be obtained from pages 476 to 486 of the record,—although the advertisements there reproduced, which were published by respondent only after the petitioner had issued its order to cease and desist, may differ in some respects from the advertisements published by respondent prior to that time (R.412-413). An examination of the booklet above mentioned will also serve to indicate, in a general way, the character of the statements made by respondent in its advertisements; no one advertisement—and probably not all of the advertisements together—contained all of the statements found in such booklet; but it is believed that no advertisement made any representation not contained in such booklet.

Respondent's advertisements were probably susceptible of being fairly construed as containing a representation to the general effect that respondent's anti-fat treatment was scientific; and as implying a representation that such treatment could be safely self-administered—a representation, that is, that respondent's tablets could be safely self-administered, in accordance with the instructions and advice contained in the booklet that was supplied with each retail package of the tablets. Such booklet stated that the treatment was for the "average person" (R.472), with an "average case" (R.466, 471) of excessive fatness, and read, "Consult your own physician if you want special advice in any unusual condition" (R.472).

Each of respondent's tablets contained one-half grain of desiccated thyroid (R.471), which was the active fat-reducing ingredient in the tablets. Because of the desic-

cated thyroid content of the tablets, petitioner charged (R.2-6) that it was false and misleading (and constituted "using any unfair method of competition in commerce," in violation of the Federal Trade Commission Act) for respondent to advertise that its anti-fat treatment was scientific and could be safely self-administered. That, respondent denied (R.7-19).

The testimony on the issue thus raised was all medical testimony and was supplied exclusively by eleven physicians, of whom five testified favorably to petitioner's contentions, and six favorably to respondent's.

The physicians who testified gave only opinion evidence,—as an inspection of the record will show. Petitioner, in examining its witnesses as to whether respondent's anti-fat treatment was scientific and could be safely self-administered, in effect recognized that such questions were questions of opinion; in instances, the interrogatories that petitioner propounded to its witnesses were so phrased as, in terms, to put the questions in issue to its witnesses, frankly and candidly, as questions of opinion and not questions of fact at all (*ex. gr.*, as to "scientific"; R.86, 190; and as to "safe", R.84, 115-116, 187, 220).

The physicians whom petitioner called as witnesses, all testified that it could not properly be said that respondent's anti-fat treatment was either scientific or safe. The physicians whom respondent called, all testified to the contrary; they testified that it could properly be said both that respondent's anti-fat treatment was scientific, and also that it could be safely self-administered,—and they told why they thought so (R.244, 246-247, 249, 251, 267, 276, 281, 306, 307, 313-314, 347 as to "scientific"; and R.249, 251, 257, 276, 280, 297, 304, 305, 306, 313, 319, 326, 328, 333, 336, 352, 363-364, as to "safe").

As to the nature, properties, and effects of desiccated thyroid, the physicians were equally unable to agree. Thus, to illustrate, one physician rashly testified that thyroid is "more powerful" than strychnine (R.174, 200); but he afterwards recanted, and limited himself to the statement that thyroxin—the active principle of thyroid, for the obtaining of a very small quantity of which it is necessary to use a number of tons of thyroid (R.202)—is more powerful than strychnine (R.201); another testified that thyroid is not comparable to strychnine in any way, and he told why that is true (R.298-299, 304); and another supplemented that testimony by saying that there were a few men fifteen or twenty years ago who felt quite a "phobia" about thyroid (R. 328), but that the profession generally had "gotten over our awe about thyroid" (R.327); while even petitioner's witnesses admitted that thyroid operates to reduce excessive fat in the same manner,—by an oxidizing process, increasing metabolism,—as does exercise (R.201-202, 151-152, 153, 80, 94), and when taken in excess, produces only the same symptoms which attend excessive exercise (R. 97-98, 100), and leaves no permanent ill effects, even when taken in excessive doses,—the symptoms following an over-administration of thyroid all disappearing soon, if the taking of the thyroid be discontinued (R.100, 104). Again, one of petitioner's witnesses testified that a case of incipient goiter might be flared up by the administration of too much thyroid (R.118), while another of petitioner's witnesses testified just to the contrary (R. 74-75). Again petitioner's physicians considered that before taking thyroid, a patient should be subjected to a test as to his "basal metabolism" (R. 141), and should be kept under "metabolic control" (R. 86) while taking it, and that his metabolism could be measured "accurately" by a machine (R.81); the other physicians considered that machines for measuring metabolism, unless expertly

used under perfect control, were not dependable as to their measurements (R.241, 255, 273-274, 283, 301-302, 353), and that, although the administration of thyroid became commonplace between 1896 and 1900, such machines did not come into use at all until 1918 or 1920, and, even now, can be found only in large centers of population (R. 241). Again, petitioner's physicians testified, in substance, that nobody should take thyroid except under direct medical surveillance; the physicians who testified for respondent disagreed with that view,—and one of them testified that he had let two of his patients, each of whom was taking two grains of thyroid a day, go from Chicago to Florida, and continue taking the thyroid, while in Florida, wholly free from medical supervision, and without other instructions than to discontinue taking the thyroid if certain symptoms, which he described to them, should appear (R.258, 265-266).

The above is merely illustrative—and not by any means exhaustive—of the divergences in the expert testimony. The record is replete to overflowing with contradictory statements and views on the part of the respective physicians, similar to those above noted. The petitioner's trial examiner—who was the only person connected with petitioner that saw the witnesses and heard them testify (R. 519)—came to the conclusion, and so reported to the petitioner, in substance (R.534-537), that all of the physicians who testified were of good professional standing and good credibility; and that having regard for the contradictions in their statements and the divergences in their views, the determination of the "scientific dispute"—involved in the question whether respondent's representations in its advertisements, to the effect that its anti-fat treatment was scientific and could be safely self-administered, were false—could not be "safely or justly predicated upon the evidence contained in this record."

Such report of the trial examiner is quoted, in part, in a footnote of the lower court's opinion (R. 543).

Petitioner, however, saw fit—notwithstanding that it had not seen any of the witnesses, or heard them testify—to disregard altogether its trial examiner's view as to the credibility of the witnesses and the weight properly to be accorded to the radically contradictory testimony; and, basing its action exclusively upon the testimony as it appeared in typewriting, petitioner proceeded to make the findings and conclusions that are shown in the record (R.21-25),—thereby wholly disregarding the testimony of respondent's witnesses, arbitrarily and capriciously and without assigning any reason for so doing (R.520-522).

At the same time, petitioner issued its order to cease and desist (R.26-27), which is accurately summarized in the lower court's opinion, thus (R. 543):

> "The Commission's order to desist and refrain contains six specific prohibitions against advertising. Taken together, they reduce to two; they forbid the representation that Marmola is a scientific remedy for obesity; and, thereupon, they forbid advertising Marmola as a remedy for obesity unless the statement is added that it is not safe to be taken except under the supervision of a competent physician" (R.543).

The first ground upon which the lower court condemned such order, was that it forbade the publication of what were essentially mere expressions of opinion, and not representations of facts at all; and that the statute had not made petitioner an arbiter of opinions, or given petitioner any power to do anything more than to prevent the publication in advertisements of false representations of facts.

The lower court condemned petitioner's order to cease and desist upon a further ground, also.

Such order, it will be observed, directed respondent, in substance, either not to advertise its Marmola tablets at all; or, if respondent should advertise them, to insert in its advertisements an explicit statement to the specific effect that no purchaser could safely take such tablets unless he should first employ a competent physician, and should take them under such physician's supervision. Under such order, respondent could not advertise its tablets, even if it should insert in its advertisements advice that the person taking them should adopt every one of the precautions which the petitioner's physicians advocated, including the precaution of having his basic metabolic rate measured, in advance and at frequent intervals, by a machine, and every other precaution; respondent could do nothing except to advise a purchaser of its tablets to employ a physician. In effect, and doubtless in intent and purpose, such order was substantially a command to respondent to cease doing business altogether.

In its "Conclusions," upon which, in part, it based its order to cease and desist, petitioner said that respondent's advertising that its anti-fat treatment was scientific and could be safely self-administered, was "to the prejudice of the public and respondent's competitors" (R.25). And thereby petitioner gave it to be understood, inferentially, that the issuance of its order was, in the words of the statute, "to the interest of the public". That, the lower court, in effect, denied; it said, in effect, that the issuance of the order had not been prompted by any desire or purpose on petitioner's part to protect, and would not operate to protect, any "interest of the public", the protection of which had been committed by the statute to petitioner,—the lower court taking the view that petitioner had not been constituted the general guardian of the public welfare, which petitioner appeared to regard itself, and had not been empowered to protect the public from any and every evil that petitioner might

consider that it was generally "to the interest of the public" to uproot and destroy, but only from the evil of undue restraint of trade and of competition in trade, arising out of the use of unfair methods of competition.

No member of the public appeared before petitioner to complain that he, or she, had been deceived by respondent's advertisements, or injured by its anti-fat treatment. Although it was proved that respondent's tablets had been sold for upwards of twenty years (R.38), no proof was adduced that anybody had ever been injured by taking them; and it was proved without contradiction that desiccated thyroid can be bought by anybody,—even a child,—at any drug store, without a prescription, the same as can calomel, or quinine, or laxative pills, or any other non-poisonous drug (Resp. Ex.1, R.91; R.237, 297, 326).

No competitor of respondent appeared before petitioner to complain that respondent's advertisements were false or misleading, or that they were injurious to such competitor or to any competitor of respondent, or to the general trade or business of selling anti-fat treatments. No competitor asked any protection against respondent's advertisements or advertising methods.

The role of complaining witness in the proceeding before petitioner, was occupied exclusively by the Director of the Bureau of Investigation of the American Medical Association (R.110-113, 130-134, 159-170). His testimony was such as to show that he was not concerned at all about the welfare of respondent's competitors in the trade of selling anti-fat treatments, or about the welfare of such trade itself, or about maintaining fair and free competition in such trade, but that he was concerned solely that such trade should be utterly destroyed, for the benefit, as he conceived, of the public health, and for

the financial advantage of members of the American Medical Association,—who, of course, in their legitimate activities as practitioners of medicine, are not engaged in commerce at all, and hence are not properly or lawfully objects of any official concern or action on the part of petitioner.

The record shows that during the time while petitioner's proceeding against respondent was pending before petitioner, the attitude of petitioner—as evidenced by statements made by its chairman, professing to speak in his official character—was that the trade of selling anti-fat treatments should be utterly destroyed; and that, in that behalf, the advertising of such treatments should be altogether prevented (R.420, 487-495; R.446-449). The record shows also (R.414-464, 487-507), that in an effort to prevent the advertising of, and so to destroy the trade in, anti-fat treatments and some other commodities (R.438-439, 446-449), petitioner, by its chairman, cajoled and intimidated the publishers of newspapers and magazines throughout the United States, into entering into what was in effect a conspiracy that such publishers would concertedly submit to a censorship of the publication of advertising matter, which should be, and was in fact, exercised by petitioner and certain organizations throughout the country known as Better Business Bureaus, acting cooperatively as censors; and that such publishers would, at the instance of petitioner and such Better Business Bureaus, concertedly boycott, and decline to render advertising service to, persons engaged in the trade of selling anti-fat treatments, and in the other trades that were proscribed by petitioner (R.414-464, 487-507). The record shows also (R.414-464, 487-507), that even before petitioner had entered its order to cease and desist against respondent, and also afterwards,—while the question of the validity of such order was pend-

ing before the lower court,—petitioner was actively engaged, in cooperation with various Better Business Bureaus, in seeking to destroy (and, in truth, in largely destroying) petitioner's business, partly by and through exercising the powers of censorship and boycott which they had acquired through the above mentioned conspiracy of publishers; and partly, by and through browbeating and frightening publishers that were not participants in such conspiracy, into declining to publish advertisements of respondent's anti-fat treatment, by means of unlawful threats directed to such publishers, that if they should publish respondent's advertisements, petitioner would file complaints and institute proceedings, before itself, against such publishers (R.414-464, 487-507).

In that state of the record, the lower court interpreted petitioner's order to cease and desist, and reversed and set it aside (R.540), as being in excess, and an attempted perversion, of petitioner's lawful powers,—not such an order as it was "to the interest of the public" that petitioner should issue—for substantially these reasons: that petitioner's order was not intended, and would not operate, merely to prevent undue and unlawful restraint in the trade of selling anti-fat treatments, by preventing respondent from "using any unfair method of competition in commerce" by publishing false advertising, which the court considered was the limit of what it was competent for respondent to do in "the interest of the public"; that petitioner's order was intended, and would operate, to destroy petitioner's business and, if conceded to be sound and sustainable in principle, would enable petitioner, by issuing like orders against others engaged in the trade of selling anti-fat treatments, to destroy the whole of such trade; and that petitioner had not been created, and was not authorized to act, as an agency to destroy any trade,—under the guise and subterfuge of merely preventing, in the interest of the public, the use

in such trade of any unfair method of competition in commerce,—howsoever inimical to the public welfare petitioner might deem such trade, or such trade might in fact be.

SUMMARY OF ARGUMENT.

The lower court decided but one single question,—not two questions; and that, a question of petitioner's jurisdiction. The lower court denied petitioner's jurisdiction upon two grounds.

The first ground was that petitioner's power to prevent the publishing of false statements in advertisements (as amounting to "using any unfair method of competition in commerce", within the meaning of the statute) was limited, by the statute, to preventing the publication of false statements of *facts*, and *not* mere expressions of *opinion;* and that respondent's statements in its advertisements, which petitioner had assumed to interdict,—to the general effect that respondent's anti-fat treatment was scientific and could be safely self-administered,—were mere expressions of *opinion, not* statements of *facts*. In denying petitioner's jurisdiction upon such ground, the lower court did not go counter to any decision of this court, or of any Court of Appeals.

The second ground upon which the lower court denied petitioner's jurisdiction was, that petitioner's power to issue any order to cease and desist was limited, by the statute, upon the condition that the issuance of such order should be "to the interest of the public"; and that inasmuch as it appeared that petitioner had issued its order commanding respondent to cease and desist from publishing the advertisements in controversy, rather with a view to destroying the trade of selling anti-fat treatments, than with a view to merely preventing the undue restraint of such trade, by prohibiting the use of unfair

methods of competition therein, therefore the issuance of such order had not been "to the interest of the public."

There is no support in the record for petitioner's assertion that the lower court denied petitioner's jurisdiction, either (1) upon the ground that respondent's competitors were not "honest", in that they published false advertisements; or (2) upon the ground that no injury to any individual competitor of respondent had been affirmatively proved to have resulted from respondent's publication of the advertisements in controversy, and no injury to respondent's competitors, as a class, could be presumed to have resulted from such publication. The decisions cited by petitioner for the purpose of showing the impropriety of denying petitioner's jurisdiction upon either of such grounds, are accordingly wholly without bearing upon the case at bar, and the lower court's decision is not in any degree inconsistent with any of such decisions.

If the lower court be considered to have been right as to either one of the grounds, first above stated, upon which it rested its denial of petitioner's jurisdiction, there is no necessity for this court's inquiring whether it was right as to the other ground also. If the lower court was right as to either ground, its decision would have to be affirmed; and it was so clearly right as to the first of such grounds, as to render inquiry in respect of the second ground superfluous,—although it was clearly right as to the second ground, also.

If the lower court be considered to have been wrong as to both of the grounds upon which it rested its decision, still there is no necessity for this court's reviewing the lower court's decision; because it is clear from the record that petitioner's order would have to be set aside upon grounds which the lower court, in the view which it took of the case, found it unnecessary to pass

upon:—namely, the grounds (1) that petitioner's order is repugnant to the Fifth Amendment, (a) in that petitioner was violently and obsessionally prejudiced against respondent, and against its anti-fat treatment and all other anti-fat treatments, whereby petitioner could not, and did not, accord respondent a fair hearing, and (b) in that petitioner arbitrarily and capriciously declined to give effect to the testimony which respondent adduced before petitioner; and (2) that petitioner's order is repugnant to the First Amendment, in that it constitutes an unlawful abridgement of respondent's freedom of speech.

ARGUMENT.

I.

The lower court decided but one single question,—not two questions; and that a question of petitioner's jurisdiction.

One unfamiliar with the record, reading the petition and petitioner's brief, might possibly gain the impression that the lower court decided two questions: first, a question as to petitioner's jurisdiction; and second, a question as to whether respondent's representation that its anti-fat treatment was scientific and could be safely self-administered, was a representation as to matter of opinion or matter of fact,—and that such second question was quite unrelated to the first.

The nearest that the lower court approached to deciding two questions, was to hold, in effect, that there were two good grounds,—either of which was sufficient, by itself and quite independently of the other,—upon which to sustain a conclusion that petitioner had not had jurisdiction to issue its order to cease and desist (R.26-27), which the lower court reversed (R.540).

II.

Statement of the first ground upon which the lower court denied petitioner's jurisdiction.

The first ground upon which the lower court decided that petitioner lacked jurisdiction to enter its order to cease and desist against respondent, was that petitioner's jurisdiction in respect of forbidding the publication of false representations in advertisements, is limited to preventing the publication of false representations of facts; and that respondent's representations, in its published advertisements, that its anti-fat treatment was scientific and could be safely self-administered, were representations of mere opinions, and not of facts.

The portion of the lower court's opinion in which it ruled against petitioner's jurisdiction upon such ground, extends from the eighth paragraph of such opinion,—beginning with the words, "The first question raised" (R.543),—to and including the eighteenth paragraph thereof,—ending with the words, "rests the finding of general danger" (R.547).

The premise of law upon which such portion of the lower court's opinion rests, although not explicitly stated therein, is found in the following provisions of Sec. 5 of the Federal Trade Commission Act,—which section authorizes the petitioner to institute a proceeding (and therein to make findings, and to base thereon an order to cease and desist) to prevent any person from *"using any unfair method of competition in commerce . . .* if it shall appear to the commission [petitioner] that a proceeding by it in respect thereof would be *to the interest of the public"*,—to wit (Petitioner's brief, pp.22, 23; U.S. Code, Tit. 15, Sec.45):

> "If . . . . . the commission shall be of the opinion that the method of competition in question is prohibited by

this Act, it shall..... state its findings as to the *facts*, and shall issue..... an order..... to cease and desist from using such method of competition..... The findings of the commission as to the *facts*, if supported by testimony, shall be conclusive..... The commission may modify its findings as to the *facts*, or make new findings,..... which, if supported by testimony, shall be conclusive" etc. (Our italics).

That statutory language shows that Congress never intended that petitioner should be an arbiter of *opinions*, or that petitioner should have jurisdiction—whether under the guise of preventing the use of any unfair method of competition in commerce, or otherwise—to issue any order commanding anybody to cease and desist from publishing any *opinion*, regardless of what petitioner's view might be as to the soundness or unsoundness—and, in that sense, the truth or falseness—of such *opinion*, or as to whether the suppression of such *opinion* would be to the interest of the public.

It is understood that petitioner does not contend that the lower court erred in disposing of the case at bar upon the premise that petitioner has no jurisdiction to prevent the publishing of opinions, howsoever unsound or dangerous petitioner may deem them to be. Petitioner is understood to confine its contention to asserting that, in reaching the conclusion that respondent's representations, in its published advertisements,—that its anti-fat treatment was scientific and could be safely self-administered,—were a mere expression of opinion and not representations of facts, the lower court thereby rendered a decision which is in conflict with a decision of this court, and with the decisions of certain Courts of Appeals. (Petition, p.6, par. "(3)"; pp.8-9, par. "3". Petitioner's brief, pp.17-19).

III.

The lower court's decision that petitioner lacked jurisdiction upon the first ground assigned by the lower court in that regard, is not in conflict with any other decision.

Petitioner is understood to assert that the decisions which are cited in the petition (p.9) and in petitioner's brief (p.18), hold, in effect, that a question of whether a medicinal preparation is scientific and can be safely self-administered, is a question of fact. Respondent respectfully denies that any such holding is to be found in those decisions.

In *Seven Cases v. United States* (1916) 239 U.S. 510,—the first of the cases cited by petitioner,—the manufacturer of "Eckman's Alterative" represented that such preparation was "For all throat and lung diseases, including . . . Tuberculosis (Consumption)", and said, "We know that it has and will cure Tuberculosis". The manufacturer admitted on the record, by demurrer, that there was no drug or substance that could be relied upon to cure tuberculosis. It was held that the manufacturer's representation that its preparation would cure tuberculosis, was false and fraudulent; and therefore that the manufacturer had been guilty of misbranding its preparation, within the provision of the Food and Drugs Act, which declared that any drug should be deemed to be *"misbranded"*, if the label on the package in which it was sold, or any circular enclosed inside such package, contained any statement "regarding the curative or therapeutic effect of such article . . . . . which is *false and fraudulent.*" The ground upon which such holding was based was not that the manufacturer's statement that its preparation would cure tuberculosis, was a representation of fact. The court recognized and conceded that such statement was an expression of mere opinion, so far as it related to the therapeutic effect of

Eckman's Alterative; and the court did not consider whether, from the standpoint of therapeutic science, the opinion embodied in such statement was sound or unsound, true or false,—except to note that the manufacturer had itself in effect admitted upon the record, by its demurrer, that such opinion was unsound, therapeutically considered. But the court held that the statement in question was a statement of fact, so far as it related to what was the manufacturer's real opinion, or belief, or state of mind, with reference to the therapeutic effect of Eckman's Alterative; and that, as a statement of the manufacturer's opinion, or belief, or state of mind, such statement was false, and that the manufacturer had been guilty of fraud in making it, because it had constituted a misrepresentation, knowingly and intentionally made, of a matter of fact, namely, the manufacturer's real state of mind,—a conclusion which was inescapable, in view of the fact that the manufacturer had admitted of record that there was no drug or substance that could be relied upon to cure tuberculosis, wherefrom it followed that it could not possibly have been the manufacturer's real opinion that its preparation would cure tuberculosis. The court said, in that connection, at pages 517-518:

> "It is said that the owner has the right to give his views regarding the effect of his drugs. But *state of mind* is itself a *fact*, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances, or compositions, alleged to be curative, are in a position to have *superior knowledge* and may be held to *good faith* in their statements." (Our italics).

The two other cases that are cited by petitioner,—*Eleven Gross Packages etc. v. United States* (1916), 233 Fed 71 (C.C.A.3), which involved "Dr. Williams Pink

Pills"; and *Hall v. United States* (1920) 267 Fed. 795 (C.C.A.5), which involved "Texas Wonder. Hall's Great Discovery,"—arose under the same statute, and presented the same questions, as *Seven Cases v. United States* (239 U.S. 510) *supra*, and are indistinguishable from it in principle.

In neither of such cases did the court say, or suggest, that a statement of mere belief, as to the therapeutic effect of a medicinal preparation, was anything more or other than an expression of opinion, so far as it related to a question of therapeutics; in neither of them did the court undertake to find out or determine whether the opinion involved was sound or unsound, true or false, from the standpoint of therapeutic science; in each of them the court said, that—wholly apart from the question of whether the opinion in question was sound or unsound, true or false, when therapeutically considered—the person who had expressed such opinion had not really entertained the opinion he had expressed, and that therefore he had stated a falsehood, and committed fraud, when he had represented that he did entertain it, and that it was his opinion, when it was not.

All three of the cases cited by petitioner are but special applications of the familiar principle that every representation of matter of mere opinion is, in part, a representation of fact, in that it purports to disclose the representor's true state of mind,—a matter of fact; and that such representation constitutes actionable fraud, if the representor is in a position to have superior knowledge, so that his expression of opinion is likely to be relied upon and so to deceive, and if what he puts forth as his opinion is not actually his opinion, but misrepresents his real, true, state of mind. *James-Dickinson Co. v. Harry* (1927), 273 U.S. 119, 123-124; *Vulcan Metals Co. Inc. v. Simmons Mfg. Co.* (1918), 248 Fed. 853, 856-857, (C.C.A.2), *certiorari* denied, 247 U.S. 507; *Knicker-*

bocker Merchandising Co. v. United States (1926), 13 Fed. (2d) 544, 545-546, (C.C.A.2), *certiorari* denied, 273 U.S. 729; *Taylor v. Burr Printing Co.* (1928), 26 Fed. (2d) 331, 334, (C.C.A.2), *certiorari* denied, 278 U.S. 641; *Edgington v. Fitzmaurice* (1885), 29 C.D.459, C.A.; 53 L.T. (N.S.) 369, 376.

None of the three cases that are cited by petitioner touches, in the remotest degree, upon the question of whether respondent's representations that its anti-fat treatment was scientific and could be safely self-administered, are properly to be regarded as representations of mere opinions, or of facts. One of such cases (*Seven Cases v. United States*) was brought to the attention of the lower court, together with other cases which are not referred to in the petition for certiorari, or in the petitioner's brief in this court. The lower court, in its opinion,—after citing and briefly discussing such cases,—said: "We cannot see in these cases any particular bearing on the question here" (R.548),—meaning, upon the question of whether respondent's representations which were in controversy, were representations of mere opinions, or of facts.

Considered in their broader aspects,—as holding that a representation as to matter of mere opinion will constitute fraud, if the representor possesses superior knowledge and does not actually believe in the opinions which he expresses, but misrepresents his true state of mind,—the three cases that are cited by petitioner, are wholly without any possible application to, or bearing upon, the case at bar. It is not charged in the complaint herein (R.2-6) that respondent did not truly state its real opinion and belief, or that respondent misrepresented its true state of mind, or that respondent acted in bad faith in any way, when it published its representations that its anti-fat treatment was scientific and could be safely self-

administered. As was said by the lower court in its opinion (R.543-544):

> "There is, in the petition [complaint] filed by the Commission, no claim that the representations as to science and safety, were fraudulent and not made in good faith, or were so obviously and clearly unsound that they could not plausibly be held by any intelligent person. There being no issue as to fraud or bad faith, no proofs were taken on either side and such suggestions as are now made with that aspect must be disregarded" (R.543-544).

In no possible aspect of the matter, it is respectfully submitted, can it be reasonably concluded that there is any conflict between any of the three cases that are cited by petitioner, and the decision by the lower court that respondent's representations in its published advertisements, that its anti-fat treatment was scientific and could be safely self-administered, were representations of mere opinions and not of facts.

IV.

Statement of the second ground upon which the lower court denied petitioner's jurisdiction.

The second ground upon which the lower court decided that petitioner lacked jurisdiction to enter its order to cease and desist against respondent,—although not explicitly stated in the opinion,—was that it was not "to the interest of the public" that petitioner should have entered its order to cease and desist against respondent.

Such second ground is set forth in the four paragraphs of the opinion next preceding the last paragraph thereof (R. 548-550), beginning with the sentence, "A broader question of the jurisdiction of the Commission underlies" (R. 548); and ending with the sentence, "Again, it cannot be seriously contended that the machinery of the Com-

mission was intended to give governmental aid to the protection of this kind of trade and commerce" (R. 550).

The articulation of such portion of the lower court's opinion with the remainder of the record, is found in the following statement in the petitioner's "Conclusions" (R. 25),—which "Conclusions" are referred to in, and made a part of the basis of, petitioner's order to cease and desist (R. 26),—to wit (R. 25):

> "The practice of said respondent [meaning, the practice of the Raladam Company in publishing advertisements, which the Federal Trade Commission deemed false and misleading, to the effect that such company's anti-fat treatment was scientific and could be safely self-administered] under the conditions and circumstances described in the foregoing findings are [is] *to the prejudice of the public and respondent's competitors*", etc. [Our italics].

The ruling made by the lower court in the above identified portion of its opinion, amounted in substance, respondent respectfully submits, to this: that, under Sec. 5 of the Federal Trade Commission Act, petitioner had no power to issue an order to cease and desist against anybody's publishing false advertisements (and thereby "*using any unfair method of competition in commerce*"), unless the institution and prosecution of such proceeding would be "*to the interest of the public*"; and that, under the facts disclosed by the record in the case at bar, petitioner's issuing an order to cease and desist against respondent had not been "*to the interest of the public.*"

Summarily stated, the considerations upon which the lower court appears to have rested such ruling, appear to have been substantially these: that petitioner had not been created for the purpose of providing an agency that should protect the public, by and through the instrumentality of an order to cease and desist, from any and every evil from which petitioner might conceive that it

was "to the interest of the public" that the public should be so protected; that petitioner had been created for the purpose of preventing such, and only such, injury to the public as might arise, or be threatened, by or through the undue restraint of legitimate trade (as a result of anybody's "using any unfair method of competition in commerce" in such trade), and that it was not "to the interest of the public" that petitioner should issue any order to cease and desist, except in order to prevent such undue restraint in such trade, as the primary purpose of such order; that petitioner had not been created to destroy any branch of trade, even though petitioner might consider—and, conceivably, might be right in considering—that such branch of trade was inimical to the public good; and that the only interpretation of which the record in the case at bar, and petitioner's order to cease and desist, were reasonably susceptible, was that petitioner had issued its order to cease and desist herein,—*not* for the purpose of freeing the trade in anti-fat treatments (for medically unsupervised self-administration) from any undue or unlawful restraint imposed by respondent's advertising, and *not* for the purpose of securing free competition in such trade, in order primarily thereby to benefit respondent's competitors, and, through benefiting them, to benefit the public,—but primarily and essentially for the purpose, and to the end, of altogether destroying respondent as a competing factor in the trade in such anti-fat treatments, by preventing respondent from advertising its anti-fat treatment, as one for medically unsupervised self-administration, at all; and that the entry of such order had not been "to the interest of the public," in the proper sense and meaning of those words as used in the statute, and hence that the entry of such order had been beyond petitioner's jurisdiction,—even on the assumption that trade in anti-fat treatments for unsupervised

self-administration was a public evil, and that petitioner's order to cease and desist would be effectual to destroy, or would go far towards destroying, such trade altogether.

In placing such interpretation upon the record, and upon respondent's order to cease and desist, the lower court appears to have taken into account the character of petitioner's order to cease and desist,—that it substantially forbade respondent from advertising its product as an anti-fat treatment for medically unsupervised self-administration, at all; the character of respondent's business of selling an anti-fat treatment for medically unsupervised self-administration,—that the "elimination" of such business might well be considered to "tend to the public good"; what petitioner's attitude appeared to be, in respect of considering itself as charged with the duty and power of protecting the public from evil generally, as disclosed by "this record, . . . other recent or pending cases in this court [the lower court] and other decisions of the Commission, and . . . *announcements by its members shown in this record*" (R.549),—the lower court apparently referring, by the italicized words, to what appears in the record herein, at pages 447-449, 487-495, 438-439, which should be read if the reasoning that underlies the lower court's decision is to be grasped in its full import; and the circumstance that it was inconceivable that petitioner could have issued its order to cease and desist for the purpose of benefiting, in any manner or degree, any of respondent's competitors, all of whose anti-fat treatments, the lower court said, were on the same *index expurgatorius* (compiled by the American Medical Association, R. 110-113, 130-134, 159-169, and apparently adopted by petitioner) with respondent's Marmola tablets, and were *"relatively disreputable"* (R.550).

V.

There is no support in the record for the contention that the lower court denied petitioner's jurisdiction upon the ground that respondent's competitors were not "honest",—in that they published false advertisements, or otherwise.

A writ of certiorari will not be granted except upon a ground that has a substantial basis in the record. *Mellon v. McKinley* (1927), 275 U. S. 492.

There is no support in the record, it is respectfully submitted, for petitioner's suggestion,—in its petition (p. 6, par. "(1)"; pp. 7-8), and in its brief (pp. 10-11, par. "1"; p. 12, in the caption; pp. 14-17),—that the lower court based its decision that petitioner lacked jurisdiction to enter its order to cease and desist against respondent, upon the ground that respondent's competitors in selling anti-fat treatments were not "*honest*", in that they made false representations, in their published advertisements, concerning the treatments that they respectively offered for sale; and that in basing its decision upon such supposed ground, the lower court went counter to the decisions of other Courts of Appeals.

It is respectfully submitted that there is not a word in the lower court's opinion,—or in the record,—in condemnation of respondent's competitors as not being "honest", or in condemnation of their published advertisements as being false. The advertisements of respondent's competitors are not even mentioned or referred to, in the whole course of the opinion. The condemnatory statements in the opinion are all leveled at the trade or business of selling anti-fat treatments; and at the commodities offered by respondent's competitors in such trade,—which are said to be on the same *index expurgatorius* with respondent's anti-fat treatment, and to be "*relatively disreputable.*" There is no condemnation in

the opinion directed at the persons who are engaged in such trade in competition with respondent, or at their honesty, or at their trade methods, or at their advertisements or advertising methods.

The only statements in the lower court's opinion that could conceivably be regarded as relevant in the present connection, are believed to be these:

> "The medical profession has always contended that auto-diagnosis, drug-store purchases, and self-medication are dangerous to the public health and ought to be suppressed or minimized. The *evil, at least in some degree,* is not to be denied . . . . . (R.541) . . . . Very likely every member of this court will personally fully agree with this professional opinion that such public self-medication is *unwise*. . . . . (R.546) . . . . . It must be evident that the trade which was to be protected against restraint (and unfair competition is a kind of restraint) was that *legitimate* trade which was entitled to hold its own in the trade field without embarrassment from unfair competition. (R.548) . . . . . It appears that these methods of influence [meaning, the methods of influence by which, as appears at pages 414-415, 420-461, 487-507 of the record, petitioner had brought about a concerted boycott of respondent by the publishers of various newspapers and magazines throughout the country, and a concerted refusal by such publishers to print any advertisement of respondent's anti-fat treatment] . . . . . have destroyed a large part of petitioner's business [meaning, the business of the Raladam Company, respondent in this court] through refusals to accept this advertisement, and only the injunction of this court is needed to make the elimination complete. We have no occasion to deny, nor indeed, reason to doubt, that *this elimination would tend to the public good* . . . . . (R.549) . . . . . When we search this record to find the *legitimate* activities which are to be protected . . . . . we find only two such possible beneficiaries. One is the medical profession [not engaged in commerce] . . . . . The other possible benefi-

ciary is found in the list which the American Medical Association Bureau has made up [R.110-112, 130-134, 159-169] comprising a number of other commercially exploited remedies for obesity . . . . . Some of them [meaning, obviously, some of such other exploited remedies] are perhaps still being sold in substantial quantities, though that is left very vague. It is fairly to be inferred, not only that these [meaning, such of the other exploited remedies as were still being sold] are on the same *index expurgatorius* as Marmola [respondent's anti-fat treatment], but that they are *relatively disreputable.* Again it cannot be seriously contended that the machinery of the Commission was intended to give governmental aid to the protection of *this kind of trade and commerce"* (R.550). (Our italics throughout).

There is nothing in such language condemnatory of anything, except the trade or business of selling anti-fat treatments for medically unsupervised self-administration, and the commodities sold in such trade. There is no imputation or insinuation that respondent's competitors were not *"honest"*, in that they published false advertisements.

In such state of the record, there is no occasion to examine the cases that are cited at pages 14 to 17 of petitioner's brief; which are submitted by petitioner as holding, in substance, that it is no defense for a person who is being proceeded against for false advertising, to show that his competitors are guilty of false advertising. The case at bar not having been decided upon any such ground, those cases are plainly wholly irrelevant upon the question before this court.

What is said above is sufficient to establish that there is no ground for the second specification of error set forth in the petition (p. 6), namely,—that the lower court erred "In drawing an inference that there was no competition between respondent and honest dealers en-

gaged in the manufacture of similar remedies, in the absence of any proof of that fact."

The trial court, it is respectfully submitted, did not draw any such inference. It proceeded upon the assumption, which the evidence tended to establish affirmatively (R.110-112, 130-134, 159-169), that there was competition between respondent and others in the sale of anti-fat treatments. And as has been shown above, the lower court did not indulge in any inference whatsoever, as to whether respondent's competitors were *"honest"* or otherwise.

The only inference that the lower court drew was that the commodities,—the anti-fat treatments,—sold by respondent's competitors were on the same *index expurgatorius* (compiled by the American Medical Association, and adopted by petitioner) which listed respondent's anti-fat treatment as banned and interdicted; and that the treatments offered by respondent's competitors were "relatively disreputable" (R.550). And, in the footnote at the end of its opinion (R.550), the lower court stated, in substance, that the only reason that it was compelled to resort to inference as to the "relatively disreputable" character of such treatments, was that the petitioner (by its trial examiner) had erroneously prevented respondent from introducing affirmative proof in that regard,—which statement is fully borne out by what appears in the record (R.133-134). But, said the court, in concluding its observations in that connection, the "situation" (with reference to the "relatively disreputable" character of such commodities) "is too plain to require reference for further proofs" (R.550).

VI.

There is no support in the record for the contention that the lower court denied petitioner's jurisdiction upon the ground that no injury to any individual competitor of respondent had been proved, and that injury to respondent's competitors as a class could not be presumed.

Petitioner appears to assert in its brief (pp. 13-14), that the decision of the lower court is grounded upon a denial "that the Federal Trade Commission has jurisdiction to enter an order enjoining false labeling calculated to deceive a substantial portion of the purchasing public, even in the absence of an affirmative showing of injury to any individual competitor, on a presumed injury to competitors as a class, arising out of deception to the public"; and that, because the lower court's decision is based upon such supposed denial, such decision is therefore in conflict with the *Winsted Hosiery Case* (258 U. S. 483) the *Beechnut Case* (257 U. S. 441), and the *Klesner Case* (280 U. S. 19).

What petitioner thus says in its brief may perhaps be regarded as intended to support what appears in the petition at page 6, in the first specification of error, and at pages 7 to 8,—which portions of the petition it is perhaps possible that petitioner would like to have read, in the present connection, as if they did not contain the word "honest" qualifying the word "competitors" therein.

It is respectfully submitted that the lower court did not ground its decision in any degree upon any consideration either that no injury to any particular one of respondent's competitors had been shown affirmatively by proofs, or that injury to respondent's competitors, as a class, could not be presumed in the absence of proof.

All that the lower court said in that connection, was, in substance, this: that the prevention of some sort of

injury (regardless, alike, of whether it was affirmatively proved or merely presumed, and whether it was actual, or merely potential) to a trader's competitors (regardless of whether to a particular competitor, or to some or all of the competitors as a class), arising out of the publication of a false advertisement by such trader, was a condition precedent to its being "to the interest of the public" that petitioner should exercise power to command such trader to cease and desist from publishing such advertisement; that petitioner's order in the case at bar could not reasonably be supposed to have been intended for the protection of respondent's competitors, but rather and primarily for the protection of the public health; and that petitioner had no power to order any trader (apart from protecting his competitors) to cease and desist from publishing any advertisement, merely upon the ground that, in petitioner's opinion, such advertisement contained an evil exhortation to the public, or might induce and lead some persons to do some act, or to adopt some course of conduct, which would or might injure them in their health, or in their morals, and, through them, injure the whole public.

The lower court's language in that regard was (R.549):

> "It is apparent from this record, as well as from other recent or pending cases in this court and other decisions of the Commission and from announcements by its members shown in this record [R. 420, 487-495, 446-449, 438-439],—that the Commission .... believes itself authorized to issue its 'desist and refrain' orders in any case where it concludes that sales methods may mislead a substantial part of the purchasing public, in a way and to an extent that, in the judgment of the Commission, is injurious to the purchaser [i.e., injurious to the purchaser *alone*, regardless of whether there was any injury—actual or potential, presumed or proved—to any individual competitor, or to some or all competitors as a class].

> The general law of unfair competition uses the misleading of the ultimate retail purchaser as *evidence* (court's italics) of the primarily vital fact—injury to the lawful dealer; the Commission uses this ultimate, presumed injury to the final user as *itself* (court's italics) the vital fact. The result is a realization of what was suggested in the former opinion [meaning, an opinion in *L. B. Silver Co. v. Federal Trade Commission*] as the opened vista (289 Fed. 992-993) and a *pro tanto* censorship by the Commission of all advertising..... We..... cannot think that Congress had any conception that it was creating a tribunal for that kind of action. Its failure for many sessions to pass a proposed 'pure fabric' law, and others of similar character, is familiar; but if the Commission's view of its jurisdiction is right these laws are unnecessary."

The lower court's observation, above quoted,—concerning "a realization of what was suggested in the former opinion as the opened vista",—has reference to what Judge Denison had said, in a separate opinion, in *L. B. Silver Co. v. Federal Trade Commission* (1923), 289 Fed. 985, (C. C. A. 6). In that case, Judge Denison said, at pages 992-993:

> "In this matter, as in many others currently familiar, the Commission has adopted the theory that the 'unfair methods of competition' denounced by section 5 include all false, not to say unethical, advertising and promotion of a particular article by which that fraction of the public desiring to purchase an article of that class may be, in a substantial way, misled. *The vista of business censorship seen through such an opening is limitless.* (Our italics). It extends to the advertising of fire sales when there has been no fire, and of cut price sales when there has been no cut, provided sales are to be made across a state line. Such suggestions are not fancifully extreme. In the present case, thousands of pages of testimony have been taken, thousands of dollars of expense incurred,

for the government and for the respondents, and the time and attention of the Commission and of the Circuit Court of Appeals consumed to the total extent of many days—all over questions of porcine genealogy and eugenics. [The question before the court had been whether an advertisement—which stated that a kind of hogs, called Ohio Improved Chesters or O.I.C. hogs, constituted a different *"breed"* of hogs from Chester White hogs—was not false; and whether, having regard for the manner in which such O.I.C. hogs had been produced, and for the science of genetics, the requirement of truth was not that such O.I.C. hogs should be advertised merely as a separate *"strain"* of, and not a different *"breed"* from, Chester White hogs. It was held that whether *"strain"* or *"breed"* was the accurately truthful word to use in such advertisement, was a question of opinion, which the Federal Trade Commission lacked jurisdiction to determine] ..... I do not believe that the Federal Trade Commission was created for any such purpose, or that the time and efforts of the federal courts should be devoted to such situations."

It is clear from the above quoted excerpt from the opinion of the lower court in the case at bar, that the lower court did not hold,—as petitioner asserts in substance, in its brief (p. 13),—that petitioner had no jurisdiction to enter an order to cease and desist against respondent, in the absence of an affirmative showing of injury to one of respondent's individual competitors, upon a presumption of injury to respondent's competitors as a class. No such consideration entered, even remotely, into the lower court's decision.

That the lower court expressly recognized that it was sufficient to give petitioner jurisdiction to issue an order to cease and desist, if there was merely a background of competitors entitled, and intended, to be protected; and that, given such competitors in the background, it was not a prerequisite to petitioner's issuing an order to

cease and desist that any injury to any individual competitor, or class of competitors, should be affirmatively proved,—appears conclusively from what the lower court said in one of the footnotes of its opinion (R.548), wherein the lower court considered those very decisions by this court with which petitioner asserts that the lower court's decision is in conflict. In such footnote, the lower court said (R.548):

> "Attention is drawn to the comment which the Supreme Court, in its opinion in *Federal Trade Commission v. Klesner* (280 U.S. 19, 26-7), made upon the Beechnut case and the Winsted case. The comment is that in neither case did the private right of any competing trader appear to have been invaded. As we noted in our opinion in the *Toledo Pipe-Threading Co. case* (11.Fed. [2d] 337, 343), the Beechnut case needed no evidence of unfair competition with any one. The practice involved and condemned was the price restriction policy. This had been expressly found illegal under the Anti-Trust Act (*Miles Medical Co. case*, 220 U.S. 373), and expressly declared illegal by the Clayton Act. The whole ground of illegality of price restrictions is that it restrains competition between trade competitors. To have considered this ground in making application to the Beechnut case, would have been supererogation. The opinion in the Winsted case expressly declares (p.493): 'the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear, who brand their product truthfully. For when misbranded goods attract customers by means of fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods.' And again (p.494) after finding that the public had an interest in stopping the practice as wrongful: 'And since the business of its trade rivals who mark their goods truthfully was necessarily affected by that practice, the Commission was justified,' etc. It seems quite clear

that the Klesner opinion in making reference to the Beechnut case and the Winsted case as not involving invasion of the private right of any trader competed against, intended to put the emphasis upon the right of a *private* or *individual* complaining competitor; and is not inconsistent with the necessity of injury to the class of 'honest manufacturers' who were named and directly protected in the Winsted case, and who were in the background in the Beechnut case" (court's italics).

VII.

If either of the grounds upon which the lower court denied petitioner's jurisdiction was sufficient, there is no necessity for inquiring as to the sufficiency of the other ground.

In *United States v. McFarland* (1927), 275 U. S. 485, this court, in assigning a reason for revoking a writ of certiorari which had been granted, said that

> "The decision of this case does not require a decision of the questions which are presented in the petition for certiorari because of which the writ was granted", etc.

The decision of the case at bar, it is respectfully submitted, does not require a decision of all of the questions presented in the petition for certiorari.

If the lower court was right in deciding that the petitioner lacked jurisdiction upon the first ground hereinabove noted, then this court would find it necessary, it is respectfully submitted, to affirm the lower court's decree,—regardless of what this court's view might be as to whether or not the lower court was right in deciding that petitioner lacked jurisdiction upon the second ground, above noted, which the lower court assigned in that behalf. It would be only in the event that this court should be of the opinion that the lower court was wrong in deciding against petitioner's jurisdiction

upon such first ground, that this court would find it necessary to consider whether the lower court was right or wrong in deciding against such jurisdiction upon such second ground; and only in the event that this court should consider that the lower court was wrong on both grounds, that the lower court's decree could be reversed,—if, indeed, it could even then be reversed, having regard for the constitutional questions that are pointed out hereinafter.

It is so clear, it is respectfully submitted, that the lower court was wholly right in denying the petitioner's jurisdiction, upon the first ground upon which the lower court relied in that regard, that there is no real occasion for this court to consider whether or not a writ of certiorari should be granted to review that part of the lower court's decision in which it held against petitioner's jurisdiction on the second ground.

Respondent would not, however, have it understood that, in submitting the considerations just above noted, respondent thereby impliedly concedes that the lower court was wrong as to either of the grounds upon which it denied petitioner's jurisdiction; or that the lower court was any less clearly right as to the second such ground, than as to the first.

In announcing the premise of the second argument in accordance with which it denied petitioner's jurisdiction, the lower court said, "that the Commission came into being as an aid to the enforcement of the general governmental anti-trust and anti-monopoly policy and that its lawful jurisdiction did not go beyond the limits of a fair relationship to that policy"; and from that premise, the lower court drew the conclusion that, because the order to cease and desist which petitioner had issued against respondent, had not been limited, or even primarily di-

rected, to preventing the general trade in anti-fat treatments from being unduly restrained by the use of alleged unfair methods of competition (alleged false advertising) by respondent therein, but rather had been directed towards altogether destroying such trade, and respondent as a factor in such trade, therefore such order had gone beyond the limits of a fair relationship to the government's general anti-trust and anti-monopoly policy, and was accordingly void. And that the lower court was clearly right in adopting such premise, appears, it is respectfully submitted, not only from the considerations that were reviewed in the *Silver Case* (289 Fed. 985, 993-998), —to which the lower court, in its opinion herein, referred (R.548),—but from other and additional considerations also.

One such additional consideration is that Congress appears to have taken the term *"unfair method of competition"*, for insertion in the Federal Trade Commission Act in 1914, bodily from *Standard Oil Co. v. United States* (1911) 221 U.S. 1, 43,—where it appears to have been used for the first time, as part of the terminology of the law; and where *"unfair methods of competition"* were, in effect, said to be "such as . . . . . *suppress* competition." Another such additional consideration is that the phrase *"to the interest of the public"*, as it appears in the Federal Trade Commission Act, appears to be merely an adaptation by Congress to the statutory context, of such phrases as *"to the prejudice of the public interests"* (found in *United States v. American Tobacco Co.* (1910) 221 U. S. 106, 179), and *"prejudice the public interests"*, (found in *Nash v. United States* (1913) 229 U.S. 373, 376); which phrases were used, in those cases, as indicating a test of when a restraint of trade should properly

be deemed undue and unreasonable,—namely, when such restraint operated *"to the prejudice of the public interests,"* by enhancing prices, etc.

In view of those considerations, Congress, in enacting the Federal Trade Commission Act, appears to have used the term *"unfair method of competition,"* for the purpose of indicating the *kind of acts* about which it was intended that the Commission should concern itself,—namely, acts which tend to *"suppress* competition"; and to have used the phrase *"to the interest of the public"*, for the purpose of indicating *when* the Commission should concern itself about such kind of acts,—namely, when, and only when, such kind of acts should threaten to suppress competition to a degree that, in the Commission's judgment (subject to revision and correction by the courts) was undue or unreasonable, and would result, unless preventive measures should be adopted, in enhancing prices and producing other similar evils.

The lower court was wholly right, it is respectfully submitted, as to the second ground upon which it denied petitioner's jurisdiction, as well as to the first such ground.

VIII.

If neither of the grounds upon which the lower court denied petitioner's jurisdiction were sufficient, petitioner's order to cease and desist would have to be set aside as repugnant to the Constitution.

If the lower court's view that petitioner's order to cease and desist was void for lack of jurisdiction, should be deemed by this court to be wholly erroneous, it would then be necessary for this court to consider and dispose of respondent's constitutional objections to petitioner's order,—which, in the view that the lower court took of

the case, the lower court found it unnecessary to consider; and such objections, alone, require the reversal of petitioner's order.

(1) *Petitioner's order violated the Fifth Amendment.*

The Fifth Amendment requires that "No person shall be . . . deprived of life, liberty, or property, without due process of law." In order to satisfy that requirement, petitioner was bound to accord respondent a fair hearing; and, failing that, petitioner could not make any valid finding, or issue any valid order, against respondent. *Kwock Jan Fat v. White* (1919) 253 U. S. 454, 457-458.

Petitioner did not, it is respectfully submitted, accord respondent such a fair hearing as the Fifth Amendment required. Petitioner was flagrantly and obsessionally prejudiced against respondent, and, in the nature of things and of men, could not possibly accord respondent a fair hearing (R.414-464, 487-495).

Petitioner did not venture to deny the truth of the matter which respondent had averred,—in its answer (R. 408-507) to petitioner's cross bill (R.400-407),—for the purpose of showing petitioner's passion and prejudice against respondent. Such matter was so strongly supported by the documents which respondent pleaded, that there was hardly room to deny its truth; and petitioner contented itself with merely moving to strike such matter out as "irrelevant, impertinent, and immaterial" (R. 509, 510-512).

Petitioner, in its petition (p. 7, par. "(5)"), complains that the lower court erred "In failing to rule upon petitioner's motion to strike out", etc. It is respectfully submitted that the lower court did rule upon, and that it overruled, such motion. The lower court, in its opinion,—*ex. gr.*, in the reference to, "announcements by its [petitioner's] members shown in this record" (R. 549); and

in the sentence which begins, "When it is thought that a particular advertisement should be stopped", and in the four sentences next thereafter (R.549); and possibly elsewhere,—refers to matter that petitioner moved to strike out, as being in the record. The only tenable view is that the lower court treated—and under Equity Rule 33, properly treated—the petitioner's motion to strike out, as admitting the truth of the matter which petitioner sought to have stricken out, which was substantially the whole of respondent's answer; and that the lower court's action, in making reference in its opinion to part of such matter as being part of the record, amounted in effect to the lower court's overruling petitioner's motion to strike out.

Petitioner further failed to accord respondent the fair hearing which the Fifth Amendment required, in that petitioner, in making its findings and conclusions (R. 21-25), arbitrarily and capriciously disregarded the evidence which respondent had introduced in the proceeding before the petitioner (R.517-518; R.383-384, par. "(13)"; R. 385, par. "(16)"; R. 386, par. "(20)"). The Fifth Amendment imposes upon petitioner, as upon every other administrative board, *"the duty of deciding in accordance with the facts proved"*, and forbids that such body should *"capriciously make findings by administrative fiat"*. *Interstate Commerce Commission v. Louisville & Nashville R. Co.* (1913) 227 U. S. 88, 91, 92. An administrative board is *"bound not only to listen but to give legal effect to what has been established"*. *State of Washington, ex rel. Oregon R. & N. Co. v. Fairchild* (1911), 224 U. S. 510, 525. The petitioner, it is respectfully submitted, wholly disregarded those requirements of the Fifth Amendment.

Petitioner could not possibly have made the findings that it did make (R.21-25), it is respectfully submitted,

except by utterly rejecting substantially all of the testimony given by the six physicians that testified favorably to respondent's contentions, before the trial examiner.

Measured by whatsoever standard of excellence may be adopted,—whether by the learning, the experience, and the respective professional standings of the witnesses, or by the candor, temperateness, fairness, and reasonableness of the testimony given by them respectively, and the consistency of such testimony with itself, with common experience, and with the laws of the physical world —the testimony of the six physicians who testified favorably to respondent, is more cogent and convincing than that of the five physicians who testified favorably to petitioner.

There is accordingly no possible ground upon which petitioner's action in disregarding and rejecting substantially all of the testimony adduced by respondent, can possibly be accounted for, except upon the ground that petitioner chose to consider, arbitrarily and capriciously; that respondent's witnesses had wilfully testified falsely.

Petitioner did not have, and could not possibly have had, anything whatsoever upon which it could by possibility form any reasoned or reasonable judgment, or anything other than a whimsical intuition, as to the credibility of any of the witnesses. Petitioner had not seen the respondent's witnesses, or heard them testify. Petitioner's trial examiner alone had seen and heard the witnesses (R.381, 519). He reported to petitioner, in substance, that respondent's medical witnesses were equal in standing and credibility to petitioner's (R.534-537, 548 in footnote). And it is respectfully submitted that petitioner could not fairly or reasonably do otherwise than accept the trial examiner's conclusion, which as above noted he stated in his report, that the credibility of respondent's witnesses was equal to that of petitioner's.

The rule whereby a court accepts as final the conclusion of a master in chancery, an auditor, an assessor, or a commissioner, in respect of the credibility of the witnesses who have testified in person before him, and whom the court has not seen or heard testify, is merely a rule of reason, and does not rest upon any artificial or technical considerations. *Tilghman v. Proctor* (1888), 125 U.S. 136, 149-150; *Medsker v. Bonebrake* (1882) 108 U.S. 66, 71, 72, 73; *Donnell v. Columbian Ins. Co.* (1836) 2 Sum. 366 (Fed. Case, No.3987; 7 Fed. Cas. p.891); *Paddock v. Commercial Ins. Co.* (1870) 104 Mass. 521, 531, It is respectfully submitted that petitioner was obliged, in fairness, to act upon the same reasonable considerations, which led the courts to adopt the rule above noted; and that when petitioner disregarded such reasonable considerations,—as it did when, without ever having seen any of the witnesses or heard them testify, it rejected the conclusion of its trial examiner as to the credibility of respondent's witnesses,—petitioner's action in that regard was unfair, unreasonable, arbitrary, capricious, and repugnant to the Fifth Amendment.

(2) *Petitioner's order violated the First Amendment:*

The First Amendment provides that "Congress shall make no law . . . . . abridging the freedom of speech, or of the press." The order to cease and desist which petitioner entered against respondent,—whereby petitioner forbade respondent, in substance, to advertise its anti-fat treatment, as a medically unsupervised treatment, at all—is repugnant, it is respectfully submitted, to that provision of the First Amendment. *Leach v. Carlile* (1922), 258 U.S. 138, 140-141.

The lower court noticed, but did not decide, the question of the repugnance between petitioner's order and the First Amendment. The lower court said in that regard (R.547-548):

"Another contention should be noticed: Petitioner [respondent in this court] says to the public,—whether the statement happens to be in a printed form or orally,—that this remedy is safe to be taken according to directions by the average person; the Commission orders that the petitioner shall not make this statement unless modified in form to suit the Commission; that is, unless accompanied by the statement that it is safe only when medically supervised. Thereupon, the court, acting as a court of equity, is asked to enjoin the publication. Petitioner contends that such injunction would be a violation of the first amendment, and that its constitutional right to freedom of speech prevents such suppression. This contention is forcefully made; but we find it unnecessary to pass upon it."

CONCLUSION.

In view of the considerations above presented, it is respectfully submitted that no reason exists for the granting of a writ of certiorari as prayed by petitioner, and that the writ should accordingly be denied.

Respectfully submitted,

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STEVENSON, BUTZEL, EAMAN & LONG,
Of Counsel for Respondent.

October, 1930.

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APR 20 19

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 484

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

RALADAM COMPANY, RESPONDENT.

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RALADAM COMPANY.

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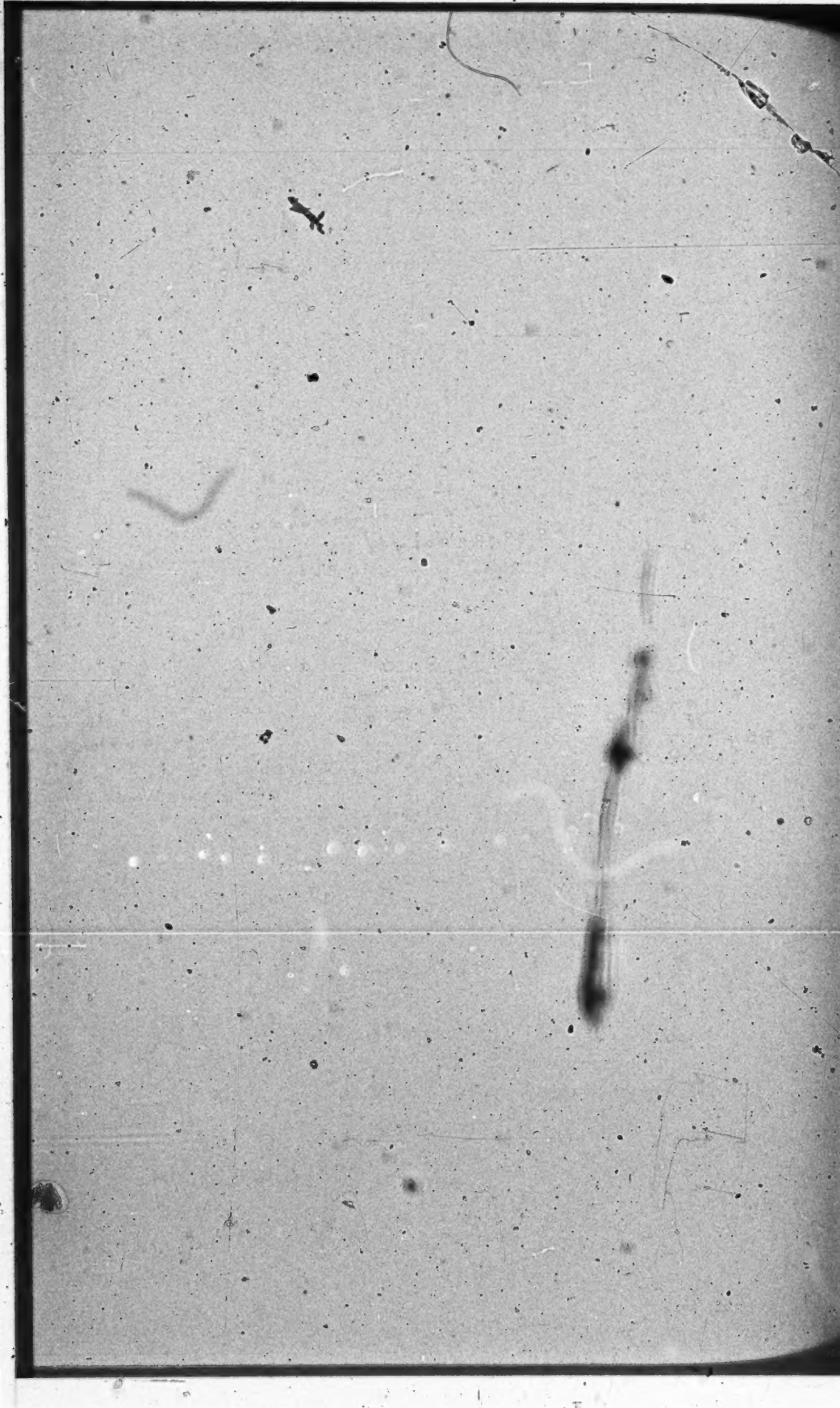

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